

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

my affidavit

77-4060

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-4060

HECTOR MOTA-SANTANA,

Petitioner

—v.—

IMMIGRATION and NATURALIZATION SERVICE,
Respondent

**ON PETITION FOR REVIEW FROM THE BOARD
OF IMMIGRATION APPEALS**

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Respondent*

ROBERT S. GROBAN, JR.,
Special Assistant United States Attorney,
SAMUEL J. WILSON,
*Assistant United States Attorney,
Of Counsel.*

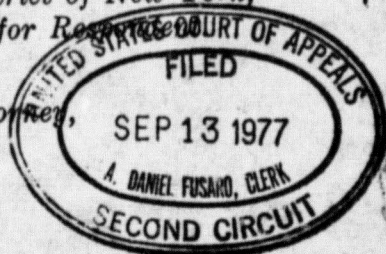


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Issues Presented	4
Statement of Facts	4
ARGUMENT:	
POINT I—Under The Immigration Act And The Federal Common Law Applicable To Deportation Proceedings, The Board's Conclusion, That Peti- tioner Was Not Unmarried At Entry And Thus Deportable, Was Correct	15
A. Construction of a term in a federal immi- gration statute is an issue of federal law ..	16
B. Under Section 101(a) (39) of the Act, Peti- tioner was not unmarried when he entered the United States	17
C. Under the appropriate federal common law, Petitioner was not unmarried when he en- tered the United States	18
POINT II—If State Law Were Applied To This Case, Petitioner Would Be Deportable Because, Under New York Law, A Decree Of Annulment Does Not Void A Marriage <i>Ab Initio</i>	23
CONCLUSION	30

CASES CITED

<i>Alacron-Baylon v. Brownell</i> , 250 F.2d 45 (5th Cir. 1957)	6
--	---

	PAGE
<i>American Mannex Corp. v. Rozands</i> , 462 F.2d 688 (5th Cir.), cert. denied, 409 U.S. 1040 (1972)	3
<i>American Surety Company v. Conner</i> , 251 N.Y. 1 (1929)	25, 29
<i>Brea-Garcia v. I.N.S.</i> , 531 F.2d 693 (3d Cir. 1976)	17, 19
<i>Carrillo-Olmos v. I.N.S.</i> , Docket No. 76-1726 (9th Cir. Decided March 21, 1977)	3, 16
<i>Corniel-Rodriguez v. I.N.S.</i> , 532 F.2d 301 (2d Cir. 1976)	2, 5, 6
<i>Cruz-Martinez v. I.N.S.</i> , 404 F.2d 1198 (9th Cir. 1968)	16
<i>Flemming v. Nestor</i> , 363 U.S. 603 (1960)	19
<i>Gaines v. Jacobsen</i> , 308 N.Y. 218 (1954)	27
<i>Galvan v. Press</i> , 347 U.S. 522 (1954)	16
<i>Gloss v. Railroad Retirement Board</i> , 313 F.2d 568 (D.C. Cir. 1962)	17, 19, 22
<i>Gonzalez v. I.N.S.</i> , 546 F.2d 515 (2d Cir. 1976)	8
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952)	19
<i>Hogue v. Southern R. Co.</i> , 390 U.S. 516 (1968)	4
<i>Horton v. Liberty Mut. Ins. Co.</i> , 367 U.S. 348 (1961)	4
<i>Jerome v. United States</i> , 318 U.S. 101 (1943)	16
<i>Jones v. Brinsmade</i> , 183 N.Y. 258 (1905)	25
<i>Kliendienst v. Mandel</i> , 408 U.S. 753 (1972)	16, 19
<i>Lem Moon Sing v. United States</i> , 158 U.S. 538 (1895)	19
<i>Marcello v. Kennedy</i> , 194 F. Supp. 748 (D.C. D.C. 1961)	20
<i>Matter of Moncrief</i> , 235 N.Y. 340 (1923)	23, 26, 27, 29

	PAGE
<i>Nott v. Folsom</i> , 161 F. Supp. 905 (S.D.N.Y. 1958), aff'd sub nom. <i>Nott v. Flemming</i> , 272 F.2d 380 (2d Cir. 1959)	17, 19, 21, 25, 29
<i>Popkin v. New York State Health and Mental Hy- giene Facilities Improvement Corporation</i> , 547 F.2d 18 (2d Cir. 1976)	16
<i>Price v. Price</i> , 124 N.Y. 589 (1891)	24, 25, 26
<i>Prudence Corp. v. Geist</i> , 316 U.S. 89 (1942)	3
<i>Reed & Martin, Inc. v. Westinghouse Electric Corp.</i> , 439 F.2d 1268 (2d Cir. 1971)	3
<i>Rehman v. I.N.S.</i> , 544 F.2d 71 (2d Cir. 1976) 3, 16, 17, 19	
<i>Romano v. Romano</i> , 19 N.Y. 2d 244 (1970)	27
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966)	4
<i>Sadowitz v. Celebrezze</i> , 226 F. Supp. 430 (S.D.N.Y. 1964)	22
<i>Santana v. Kiley</i> , 76 Civ. 1179 (S.D.N.Y. 1976)	13
<i>Shaughnessy v. Mezei</i> , 345 U.S. 206 (1953)	19
<i>Sleicher v. Sleicher</i> , 250 N.Y. 366 (1929)	25, 27
<i>Tim Lok v. I.N.S.</i> , 548 F.2d 37 (2d Cir. 1977)	18
<i>Udall v. Tallman</i> , 380 U.S. 1 (1964)	23
<i>United Gas Imp. Co. v. Continental Oil Co.</i> , 381 U.S. 392 (1965)	3
<i>United States v. Certain Property</i> , 344 F.2d 142 (2d Cir. 1965)	3
<i>United States v. Diogo</i> , 320 F.2d 898 (2d Cir. 1963) 7, 8, 16	
<i>United States ex rel. Suey v. Spar</i> , 149 F.2d 881 (2d Cir. 1945)	19
<i>United States v. Seckinger</i> , 397 U.S. 203 (1970)	4
<i>Williams v. Ocean Transport Lines, Inc.</i> , 425 F.2d 1183 (3d Cir. 1970)	3

	PAGE
<i>Williams v. State</i> , 175 Misc. 972, 25 N.Y.S. 2d 968 (Ct. Cl. 1941)	25, 29

ADMINISTRATIVE DECISIONS CITED

<i>In re: Rodriguez</i> , A30 107 981 (BIA January 12, 1977)	13
<i>Matter of Wong</i> , Interim Decision—(BIA January 12, 1977)	14

STATUTES AND CONSTITUTION

Article IV, Section 1	3
Immigration and Nationality Act, 66 Stat. 163 (1952) <i>as amended</i> :	
Section 101(a)(27)(A), 8 U.S.C. § 1101(a) (27)(A)	2, 7
Section 101(a)(39), 8 U.S.C. § 1101(a)(39)	2, 17, 18
Section 101(b)(1), 8 U.S.C. § 1101(b)(1)	2
Section 106, 8 U.S.C. § 1105a	1, 15
Section 201(a), 8 U.S.C. § 1151(a)	7
Section 212, 8 U.S.C. § 1182	6
Section 212(a)(14), 8 U.S.C. § 1182(a)(14)	2, 7, 9
Section 212(a)(17), 8 U.S.C. § 1182(a)(17) ..	1
Section 235, 8 U.S.C. § 1225	6
Section 241(a)(1), 8 U.S.C. § 1251(a)(1)	1, 9, 15, 17, 23
Section 244(e), 8 U.S.C. § 1254(e)	1

PAGE

Judiciary and Judicial Procedure Act, 62 Stat. 947
(1948) *as amended*:

Chapter 115, Section 1738, 28 U.S.C. § 1738 . . .	3
N.Y. Dom. Rel. Law § 7 (McKinney 1977)	27
N.Y. Dom. Rel. Law §§ 140-146 (McKinney 1977) . . .	27
N.Y. Dom. Rel. Law § 145 (McKinney 1977)	27
N.Y. Dom. Rel. Law § 232(a)(2)(a) (McKinney 1977)	9
N.Y. Dom. Rel. Law § 234 (McKinney 1977)	27
N.Y. Dom. Rel. Law § 236 (McKinney 1977)	27
N.Y. Revised Statutes, 1 R.S. 142 (1830)	23
N.Y. Revised Statutes, 2 R.S. 139 (1830)	23
Chapter 531 of New York Laws of 1895	26, 27

REGULATIONS

8 C.F.R. § 3.1(g)	14
8 C.F.R. § 244	1
8 C.F.R. § 244.2	2
22 C.F.R. § 42.110	5
22 C.F.R. § 42.111	5
22 C.F.R. § 42.113-116	5
22 C.F.R. § 42.114	5
22 C.F.R. § 42.122(d)	5, 6

OTHER AUTHORITIES

Comment, "Immigration Law", 51 N.Y.U.L. Rev. 1200 (December, 1976)	17
Gordon and Rosenfield, "Immigration Law and Proce- dure", Section 3.16 (1976)	6

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-4060

HECTOR MOTA-SANTANA,

Petitioner,

—v.—

IMMIGRATION and NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a, Hector Mota-Santana ("Petitioner") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals ("Board") on January 31, 1977. The Board's order (1) dismissed Petitioner's appeal from a finding of Immigration Judge Howard I. Cohen that Petitioner was deportable under Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1), for having entered the United States while within one of the classes of aliens excludable by law; and (2) affirmed the Immigration Judge's finding that Petitioner was eligible for the privilege of voluntary departure¹ and granted him voluntary

¹ See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 C.F.R. § 244. This relief can be granted where the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and facilitates any future lawful entry into this country he might wish to make. Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17).

departure within such time and under such conditions as the District Director might prescribe (AR 3-4).² The findings of deportability made by both the Board and the Immigration Judge were based on their conclusions that, although Petitioner was admitted to this country as a special immigrant's³ unmarried⁴ child,⁵ exempt from the labor certification requirement in the Act,⁶ he actually was married at the time he entered the United

² 8 C.F.R. § 244.2.

³ Section 101(a) (27) (A) of the Act, 8 U.S.C. § 1101(a) (27) (A), defines "special immigrant" as an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him. See *Corniel-Rodriguez v. I.N.S.*, 532 F.2d 301, 303 (2d Cir. 1976).

⁴ Section 101(a) (39) of the Act, 8 U.S.C. § 1101(a) (39), defines "unmarried", when used in reference to an individual as of any time as

an individual who *at such time* is not married, whether or not previously married. (emphasis added).

⁵ Section 101(b) (1) of the Act, 8 U.S.C. § 1101(b) (1), define "child" as

an unmarried person under twenty-one years of age. . . .

⁶ Section 212(a) (14) of the Act, 8 U.S.C. § 1182(a) (14). This provision of the Act makes individual aliens ineligible to receive visas and excludable from admission to the United States if they are

seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a) (27) (A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence).

States and therefore was excludable at entry for not possessing a valid labor certification or exemption from that requirement.

In this petition for review Petitioner contends that the Board erred in not terminating his deportation proceeding because the uncontested New York annulment he obtained nearly four years after his entry to this country abrogated his marriage *nunc pro tunc* and thereby vitiated the basis for his deportation.⁷ It is the Immigra-

⁷ Petitioner has also asserted that the full faith and credit clause of the Constitution, as implemented by 28 U.S.C. § 1738, required the Board to apply his New York annulment retroactively (See page five of Petitioner's brief to this Court). However, the full faith and credit clause provides merely that

Full faith and credit shall be given *in each state* to the public Acts, Records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof. United States Constitution, Article IV, Section 1 (emphasis added).

By its terms this provision clearly does not require the Service's interpretation of the Act to be bound by an unrelated state court proceeding. Moreover, even in *judicial* proceedings, courts have consistently limited the scope of the full faith and credit clause where important federal rights created by federal statutes are concerned. *American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972); *Williams v. Ocean Transport Lines, Inc.*, 425 F.2d 1183, 1187-89 (3d Cir. 1970). In such situations the courts have not applied state law definitions to federal statutes but have created and applied a federal common law to give appropriate weight to the particular national interest articulated by the statute in question. *Rehman v. INS.*, 544 F.2d 71 (2d Cir. 1976) (Immigration Law); *Carrillo-Olmos v. INS.*, Docket No. 76-1726 (9th Cir. Decided March 21, 1977) (Immigration Law); *United Gas Imp. Co. v. Continental Oil Co.*, 381 U.S. 392 (1965) (Natural Gas Act); *Reed v. Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971) (Arbitration Act); *Prudence Corp. v. Geist*, 316 U.S. 89 (1942) (Bankruptcy); *United States v. Certain Property*, 344 F.2d 142

[Footnote continued on following page]

tion and Naturalization Service's ("Service") position that the petition for review should be dismissed because: (1) in a deportation hearing construction of a term in the Act is an issue of federal law and, under federal law, Petitioner was not "unmarried" when he entered the United States regardless of his subsequent, uncontested New York annulment and whatever effect it may have in that state; and (2) assuming *arguendo* that state law would apply to a deportation hearing, nevertheless Petitioner would not have been "unmarried" when he entered this country because, under New York law, an annulment does not void a marriage *ab initio*.

Issues Presented

1. Does Federal Law Apply In A Deportation Proceeding And, If So, Is Petitioner Deportable Under The Applicable Federal Law?
2. If State Law Applies To This Case, Is Petitioner Deportable Because, Under New York Law, A Decree Of Annulment Does Not Void A Marriage *Ab Initio*?

Statement of Facts

Petitioner Hector Mota-Santana is a 25 years old native and citizen of the Dominican Republic (AR 172). Petitioner's mother, Corina Santana, also is a native and

(2d Cir. 1965) (Eminent Domain); *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961) (Civil Procedure); *United States v. Seckinger*, 397 U.S. 203 (1970) (Federal Contracts); *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968) (Labor Relations); *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (Public Officers). Consequently, Petitioner's reliance upon the applicability and effect of the full faith and credit clause is clearly misplaced and his contentions in this regard need not be addressed further.

citizen of the Dominican Republic who was admitted to permanent residence in the United States on August 4, 1963 (AR 181).

On April 17, 1970 Petitioner appeared at the United States Consulate in Santo Domingo, Dominican Republic to apply for an immigrant visa to this country (AR 177).⁸ At that time Petitioner completed his application for his visa asserting, *inter alia*, that he was the unmarried child of an alien already admitted to permanent residence (his mother) and that, as a result, he could immigrate to the United States as her child without obtaining the labor certificate usually required by the Act (AR 174-77).⁹ With his application Petitioner also submitted all of the supporting documentation¹⁰ and other information¹¹ required by the Consulate (AR 178-84, 186-89).

When the application had been completed Petitioner appeared personally before an officer at the Consulate and executed it (AR 177).¹² The officer then warned Petitioner that his preferred status as the child of a special immigrant would be lost if he married before he was admitted to the United States (AR 144-45).¹³ Petitioner acknowledged receipt of this admonition by executing the State Department's form FS-548 which stated in Spanish

"I, Hector Julio Mota-Santana, the undersigned fully understand that I shall lose my special, immediate relative or preference status or

⁸ 22 C.F.R. § 42.110.

⁹ See footnotes 3-6, *supra*; *Corniel-Rodriguez v. I.N.S.*, *supra*.

¹⁰ 22 C.F.R. § 42.111.

¹¹ 22 C.F.R. § 42.113-116.

¹² 22 C.F.R. § 42.114.

¹³ 22 C.F.R. § 42.122(d); compare, *Corniel-Rodriguez v. I.N.S.*, *supra*.

right to benefit from the immigrant status of my accompanying parent if I marry prior to my application for admission at a port of entry into the United States and that I would then be subject to exclusion therefrom." (AR 185).¹⁴

After the form FS-548 was executed, the Consulate issued an immigrant visa to Petitioner which classified him as the unmarried child of a lawful permanent resident of the United States and which permitted him to enter this country, if otherwise admissible¹⁵ on or before August 16, 1970 without regard to the labor certification requirement in the Act (AR 172-73).

On May 4, 1970, less than three weeks after Petitioner received his immigrant visa from the Consulate, Petitioner elected to ignore both the consular officer's

¹⁴ During his deportation Petitioner testified that he did not understand the warning against marriage that the consular official had given to him pursuant to 22 C.F.R. § 42.122(d) (AR 146). Apparently this testimony was elicited by Petitioner's attorney in an effort to convince the Immigration Judge that the procedures used by the Consul in issuing Petitioner his immigrant visa were unfair and should prevent the Service from effectuating Petitioner's deportation on that basis. See *Corniel-Rodriguez v. I.N.S.*, *supra*. However, it is undisputed that Petitioner was given and signed the State Department form FS-548 which appears in his file (AR 185) and this, by itself, precludes such a result. *Corniel-Rodriguez v. I.N.S.*, *supra* at 307, n. 18.

¹⁵ As Petitioner's immigrant visa indicated, the issuance of such a visa to an alien does not entitle that alien to enter the United States if, at the time the alien seeks to use the visa, he no longer fits the immigrant classification for which it was issued or is found to be excludable on some other basis (AR 172, 177). See Sections 212 and 235 of the Act, 8 U.S.C. §§ 1182 and 1225; *Alacron-Baylon v. Brownell*, 250 F.2d 45 (5th Cir. 1957); See generally Gordon and Rosenfield, "Immigration Law and Procedure," Section 3.16 ("Thus a visa issued by a consular office does not assure admittance, if the holder thereafter is found inadmissible at the port of entry").

caution not to marry and the visa's warning on admissibility by participating in a marriage ceremony with his first cousin, Andrea Soriano Santana (AR 154, 168).¹⁶ Five days later, on May 9, 1970, Petitioner traveled to New York City where he was admitted to the United States based upon his now false representation in his visa that he was the unmarried child of a Special Immigrant and, consequently, entitled to enter this country without a labor certificate (AR 172).

Shortly after his arrival in the United States, Petitioner's wife applied at the Consulate in Santo Domingo for an immigrant visa to this country based on her relationship to Petitioner (AR 172).¹⁷ To support her application Petitioner then submitted an application to the Service in which he recited both the date and place of his marriage and requested the Service to furnish a

¹⁶ The close family relationship of Petitioner to his wife, the proximity of the marriage to Petitioner's entry into the United States, and the subsequent efforts of Petitioner to use his permanent resident status to accord immigration benefits to his wife might call into question the bona fide nature of this marriage. *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963). However Petitioner's sworn statement reflects that he married his wife because he "loved her" (AR 170) and, throughout his lengthy administrative proceeding, he has made no effort to assert that his marriage was not bona fide at the time it was contracted or that it was a marriage of convenience entered into solely to confer immigration benefits on his wife. Consequently, we have assumed Petitioner's marriage to have been valid and have not addressed the effect a fraudulent marriage might have on his deportability.

¹⁷ As the spouse of an alien born in the Western Hemisphere and admitted to permanent residence in the United States, Petitioner's wife would have been able to enter the United States without regard to the quota limitations generally placed on immigration, Section 201(a) of the Act, 8 U.S.C. § 1151(a), or the labor certification requirements contained in Section 212(a)(14), 8 U.S.C. § 1182(a)(14) of the Act. See Section 101(a)(27)(A) of the Act, 8 U.S.C. § 1101(a)(27)(A).

verification of his permanent resident status to the Consulate (*Id.*). It was during this routine inquiry that the Service first learned that Petitioner had been married when he entered the United States.

As a result of the statements in Petitioner's request, the Service notified Petitioner that it wished to interview him concerning the manner in which he acquired his permanent resident status in the United States and his current status under the Act (AR 167-70). On May 23, 1973, Petitioner appeared at the Service's office for the interview (AR 167), accompanied by his brother who acted as his interpreter throughout the interview (AR 147). Before the interview commenced, Petitioner was advised in Spanish that he had, *inter alia*, a right to remain silent, a right to talk to a lawyer for advice, and, if he could not afford a lawyer, a right to have one appointed for him if he wished (AR 1447, 167).¹⁸ Petitioner declined this offer and decided to proceed without counsel (AR 167).

During the interview, Petitioner admitted that he had married in the Dominican Republic prior to his entry into the United States (AR 168) and that his marriage had been bona fide (AR 170).¹⁹ Based on these admissions

¹⁸ Had Petitioner requested appointed counsel, it is Service policy immediately to suspend interrogation and to refer the alien to the appropriate local Legal Aid Society or Legal Services Division of the local Office of Economic Opportunity. *Gonzalez v. I.N.S.*, 546 F.2d 515 (2d Cir. 1976).

¹⁹ While a marriage may be valid under the law of the jurisdiction in which it was performed, a separate and distinct inquiry is necessary to determine whether such a marriage is valid for immigration purposes. *United States v. Diogo*, *supra*. Unfortunately such a procedure is essential to protect the integrity of the immigration laws due to the increasing number of sham marriages designed to obtain immigration benefits for the participants.

as well as the statements in his request for verification of his permanent resident status, the Service concluded it had probable cause to believe that Petitioner was unlawfully in the United States and it instituted deportation proceedings against him on July 6, 1973 by issuing an order to show cause and notice of hearing (AR 164). The order to show cause alleged, *inter alia*, that Petitioner was not unmarried at entry and that, as a result, he was deportable under Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1), because he entered the United States without the labor certification required by Section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14) (AR 164-66). It also advised Petitioner of his rights in a deportation hearing (AR 165) and notified him to appear for that hearing on January 29, 1974 (AR 156, 164).

In response to the order to show cause, Petitioner immediately commenced an annulment action against his wife by personally serving her in the Dominican Republic with a summons entitled "Action to Annul a Marriage" on July 10, 1973 (AR 53, 58, 93, 194)²⁰ and by filing both the summons and verified complaint (AR 57-8, 92-3, 198-99) with the Supreme Court of the State of New York, New York County, on August 31, 1973 (AR 58, 93). When his wife failed to appear or to file a responsive pleading within the time prescribed, Petitioner drafted findings of fact and conclusions of law and a judgment of annulment and presented them to the Court for its approval on October 29, 1973 (AR 55, 90).

²⁰ Under New York's Domestic Relations Law, Section 232 (a)(2)(a), New York courts acquire sufficient jurisdiction over a non-resident defendant to adjudicate the issue of his marital status in an annulment action if the plaintiff resides in New York and the defendant is served personally with a copy of the summons with the phrase "Action to Annul A Marriage" printed on its face.

Subsequently, on January 21, 1974, the Honorable Seymour Beiber, Special Referee of Special Term, Part 5-A, of the Supreme Court of the State of New York, New York County, approved the findings of fact and conclusions of law and granted Petitioner a judgment of annulment from his wife (AR 53-4). This judgment was entered in the New York County Clerk's Office on January 24, 1974 (AR 65, 89).

On January 29, 1974 Petitioner's deportation hearing commenced before Immigration Judge Howard I. Cohen (AR 163).²¹ At this hearing, Petitioner was represented by an attorney who, in his presence and on his behalf, conceded all of the allegations in the order to show cause with the exception of the allegation that Petitioner was not "unmarried" when he entered the United States and thus entered without the labor certification required by the Act (AR 136-37). The hearing then focused on the validity of this charge.

Initially, after Petitioner had been sworn in as a witness, the Service introduced into evidence several documents which Petitioner identified as the statement he had made during his May 23, 1973 interview (AR 139, 167-171, Exhibit 2 at the hearing), the immigrant visa he used to enter this country on May 9, 1970 (AR 139, 172-80, Exhibit 3 at the hearing), a certified copy of his certificate of marriage to Andrea Soriano Santana (AR 143, 190-92, Exhibit 4 at the hearing) and the application he submitted to the Service on his wife's behalf to verify his immigration status (AR 153, 196-97, Exhibit 6 at the hearing). Together these documents supported the Serv-

²¹ The transcript of this hearing indicates that it took place on March 13, 1975 (AR 134). Since the order to show cause scheduled the hearing for January 29, 1974 (AR 164) and the decision of the Immigration Judge which resulted from this hearing is dated February 8, 1974 (AR 160), apparently the transcript is in error in this regard.

ice's factual contentions that Petitioner had been issued an immigrant visa as the unmarried child of a Special Immigrant, that on May 9, 1970 Petitioner had been admitted to this country without a labor certificate pursuant to this visa classification and that, at that time, Petitioner had been ineligible for admission to the United States because on May 4, 1970 he had married Andrea Soriano Santana.

Petitioner responded to the Service's factual showing by introducing into evidence a certified copy of his judgment of annulment (AR 148, 193-94, Exhibit 5 at the hearing) and his complaint for annulment (AR 154, 198-99, Exhibit 7 at the hearing) and asserting that, since the annulment terminated his marriage *ab initio* under New York law, he was unmarried when he entered the United States and not deportable as charged. Judge Cohen then closed the hearing and reserved his decision (AR 157).

On February 8, 1974, Judge Cohen rendered his written decision (AR 160-62). In that opinion, he found the facts to be as alleged in the order to show cause (*Id.*). However, the Judge also found that the proceeding was governed by New York law and that, under New York law, the legal effect of Petitioner's annulment was "a declaration that the marriage never existed" (AR 162). Accordingly, he concluded that "... at entry [Petitioner] was not required to be in possession of a labor certification and therefore, no longer is deportable. . . ." (AR 162).

The Service appealed Judge Cohen's determination to the Board of Immigration Appeals on March 6, 1974 (AR 158). The position of the Service on its appeal to the Board was the same as that it takes in this Court, namely, that federal law applied to a deportation proceeding, that under federal law, Petitioner was not un-

married when he entered the United States and that, assuming *arguendo* that New York law applied to Petitioner's hearing, his annulment did not void his marriage *ab initio* but only terminated it as of the date of the annulment decree (*Id.*).

After the Service (AR 129-32) and Petitioner (AR 118-27) submitted legal briefs to the Board in support of their respective positions, the Board heard oral argument on August 27, 1974 (AR 104-16). Subsequently, on March 20, 1975, the Board issued its decision which reversed the Immigration Judge's decision to terminate the deportation proceeding (AR 72) and ordered that Petitioner's case be remanded to enable the parties to supplement the record by introducing into evidence a certified copy of the verified complaint in Petitioner's New York annulment action (AR 96-97).

Pursuant to the Board's remand order, Petitioner's remanded hearing was scheduled for June 23, 1975 (AR 81, 84). Before this hearing could take place it was rescheduled for September, 1975 at the instance of Petitioner's counsel who advised the Service that he could not attend the earlier date (AR 81, 84). However, on August 20, 1975, Petitioner submitted a motion to the Board in which he requested the Board to reconsider its earlier decision in light of the complaint, findings of fact, conclusions of law and judgment of annulment from his New York annulment action that he attached to the motion as exhibits and asserted that there was no point "in permitting further delay at the immigration court level." (AR 85-94).

On October 15, 1975 the Board denied Petitioner's motion for reconsideration and returned the record in Petitioner's case to the Immigration Judge pursuant to its earlier decision (AR 81-82). Thereafter, on February 23, 1976, the Service notified Petitioner that his re-

manded hearing was scheduled to take place on March 23, 1976 (AR 79). However, on March 11, 1976, Petitioner again attempted to disrupt the orderly process of his administrative proceeding by instituting an action in the United States District Court for the Southern District of New York in which he requested the Court to issue an order prohibiting the Service from proceeding with his remanded hearing or, in the alternative, declaring that under New York law Petitioner was unmarried at the time he entered the United States and that, as a result, he was not subject to deportation proceedings (AR 43-45, 77-78). See *Santana v. Kiley, et al.*, 76 Civ. 1179 (S.D.N.Y. 1976). After the Service moved to dismiss Petitioner's federal district court action on the ground that he had failed to exhaust his administrative remedies prior to instituting the action, Petitioner entered into a stipulation discontinuing the action and it was dismissed (AR 42).

While Petitioner was pursuing his action in federal court, his remanded hearing was held as scheduled on March 23, 1976 (AR 69). At the commencement of that hearing Judge Cohen noted that his decision to terminate deportation proceedings against Petitioner had been reversed by the Board and that the case had been remanded to him for a new decision based on a record which included the verified complaint from Petitioner's New York annulment action (AR 72). The Judge then received a copy of the verified complaint into evidence (AR 73-74) and asked both parties if they had any other evidence to present (AR 74). When both sides responded negatively, the Judge proceeded to find Petitioner deportable as charged in order to show cause on the basis of *In re: Rodriguez*, a recent Board of Immigration Appeals decision in which the Board held that an alien who had

married prior to his admission to the country as the unmarried child of a Special Immigrant was inadmissible at the time he entered regardless of a subsequent annulment or the effect it might have under state law (AR 65-67). Notwithstanding this conclusion the Judge found Petitioner eligible for the privilege of voluntary departure and granted it to him within such time and under such conditions as the District Director might direct (AR 67). He also entered an alternative order of enforced deportation to the Dominican Republic if Petitioner failed to depart voluntarily within the time authorized (*Id.*).

On March 26, 1976 Petitioner appealed Judge Cohen's decision concerning deportability to the Board of Immigration Appeals asserting the same grounds for appeal he has urged before this Court (AR 64). After reviewing the entire record, the Board dismissed Petitioner's appeal on January 31, 1977 (AR 3-4). In its opinion the Board rejected Petitioner's contentions that the full faith and credit clause and law of New York required his annulment decree to be applied retroactively, relying in its precedent²² decision in *Matter of Wong*, Interim Decision —(BIA January 12, 1977) (AR 5-8) which had concluded that the interpretation of the Act was a question of federal law and that, as a matter of federal law, annulments would not be given retroactive effect where the result would cure a clear violation of the immigration laws. However, the Board also affirmed Judge Cohen's finding that Petitioner was eligible for voluntary departure and ordered that he be permitted to so depart within the time and under the conditions established by the District Director (AR 4).

²² 8 C.F.R. § 3.1(g) permits the Board of Immigration Appeals to designate certain of its decisions as precedent decisions which are binding on all officers and employees of the Service in cases involving the same issues.

On February 7, 1977 Petitioner was notified by the Service that, pursuant to the Board's decision, he had been given until March 7, 1977 within which to depart voluntarily (AR 1). On February 28, 1977, before his voluntary departure time had expired, Petitioner filed his petition for review of the Board's January 31, 1977 decision. He has since remained in the United States pursuant to the automatic stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

A R G U M E N T

POINT I

UNDER THE IMMIGRATION ACT AND THE FEDERAL LAW APPLICABLE TO DEPORTATION PROCEEDINGS, THE BOARD'S CONCLUSION, THAT PETITIONER WAS NOT UNMARRIED AT ENTRY AND THUS DEPORTABLE, WAS CORRECT.

Although somewhat obfuscated by the brevity of his brief to this Court, Petitioner's main contention in this appeal appears to be that, under New York law, his annulment voided his marriage to Andrea Soriano Santana *ab initio* and that, as a result, he was unmarried when he entered the United States and not deportable under Section 241(a)(1) of the Act. The validity of this contention will be discussed in Point II, *infra*, because its conclusion is based on a totally erroneous assumption namely, that in a deportation proceeding the Board must construe terms in the Immigration Act which relate to domestic relations pursuant to the state law applicable to such relationships. It is this unsupported assumption that we discuss initially since an examination of the decisions of this Circuit and others, as well as the definitions in the Act and the purposes behind its provisions, will demonstrate that the construction of a term in the federal immigration statute is an issue of federal law

and that, under the appropriate federal law, the Board's decision finding Petitioner deportable under Section 241 (a) (1) was proper.

A. Construction Of A Term In A Federal Immigration Statute Is An Issue Of Federal Law.

The interpretation and application of federal statutes has never been dependent upon state law absent an explicit indication from Congress to the contrary. *Jerome v. United States*, 318 U.S. 101, 104 (1943); *Popkin v. New York State Health and Mental Hygiene Facilities Improvement Corporation*, 547 F.2d 18, 19 (2d Cir. 1976). This rule has particular vitality in the immigration area because of what the United States Supreme Court has described as Congress' plenary power to determine the eligibility of an alien to enter and to remain in the United States. *Kliendienst v. Mandel*, 408 U.S. 753, 766-67 (1972); *Galvan v. Press*, 347 U.S. 522, 531 (1954). As this Court recently stated in *Rehman v. I.N.S.*, *supra* at 72-3 (2d Cir. 1976):

"Construction of a term in a federal immigration statute is an issue of federal law. Accordingly, neither the name by which a state chooses to refer to a particular disposition nor the deportation consequences that a state might wish to assign is necessarily determinative" See also *Carrillo-Olmos v. I.N.S.*, *supra* (the virtually exclusive power of Congress to regulate immigration "precludes the allowance of state law to control or impair the immigration policy of the United States"); *Cruz-Martinez v. I.N.S.*, 404 F.2d 1198, 1200 (9th Cir. 1968), *cert. den.*, 394 U.S. 955 (1969); *United States v. Diogo*, *supra*.

Of course, in certain situations the courts have utilized state definitions as a basis to formulate a federal definition which can be applied uniformly in a manner

consistent with the federal purposes embodied in the particular statute under consideration. *Rehman v. I.N.S.*, *supra*; *Brea-Garcia v. I.N.S.*, 531 F.2d 693, 695 (3d Cir. 1976); *Gloss v. Railroad Retirement Board*, 313 F.2d 568, 569-70 (D.C. Cir. 1962); *Nott v. Folsom*, 161 F. Supp. 905 (S.D.N.Y. 1958), *aff'd with modification sub nom. Nott v. Flemming*, 272 F.2d 380 (2d Cir. 1959); Comment, *Immigration Law*, 51 N.Y.U.L.Rev. 1200 (December, 1976). However, the use of state law in such cases has been limited to situations where the federal statute was silent as to the meaning of a particular term within its provisions, *Brea-Garcia v. I.N.S.*, *supra*; *Gloss v. Railway Retirement Board*, *supra*; *Nott v. Flemming*, *supra*, and where application of the state law effectuated both the state and federal interests involved without conflicting with the federal statutory scheme. *Rehman v. I.N.S.*, *supra*. In this case both the explicit language in the Act and the Congressional purpose manifest in its provisions preclude, as a matter of federal law, Petitioner's contention that he was unmarried when he entered the United States due to the effect of his subsequent annulment.

B. Under Section 101(a)(39) Of The Act, Petitioner Was Not Unmarried When He Entered The United States.

Implicit in the Board's conclusion that Petitioner was deportable under Section 241(a)(1) of the Act was its conclusion that he was not the 'child' of a Special Immigrant as that term is defined by Section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1), because he was not "unmarried" at the time he entered the United States. In this appeal Petitioner has challenged that conclusion by asserting that under New York law he was unmarried at this time because his subsequent annulment applied retroactively to void his marriage *ab initio* and to vitiate whatever immigration violation may have occurred *nunc pro*

tunc. While such a construction clearly would frustrate the enforcement of the immigration laws (See Point 1-C, *infra*), it is also clear that the purported retroactive effect of a New York annulment on Petitioner's admittedly valid marriage (AR 170) ²³ has no relevance in determining whether he was unmarried at the time of entry where the federal statute itself defines that term and manifests Congress' intent in this regard.

The term "unmarried" is carefully defined under the Act. Cf. *Tim Lok v. I.N.S.*, 548 F.2d 37, 40 (2d Cir. 1977). Section 101(a)(39) of the Act, 8 U.S.C. § 1101(a)(39), provides

"(39) The term 'unmarried', when used in reference to any individual *as of any time*, means an individual who *at such time*, is not married, whether or not previously married. (emphasis added).

Although we have not discovered any legislative history shedding light on Section 101(a)(39) or case law construing its provisions, its presence in the Act and plain meaning appear to indicate Congress' clear intentions to exclude state family law from the determination of whether an alien is "unmarried" for immigration purposes and to have that inquiry focus instead on whether the alien was *in fact* married at the time he entered this country. Since it is conceded that Petitioner's marriage to Andrea Soriano Santana was valid and in effect in 1970 when he was admitted to the United States (AR 170), the conclusion is apparent that Petitioner was not "unmarried" at this time and that, as a matter of federal law, the Board's finding of deportability was proper.

²³ See footnote 16, *supra*.

**C. Under The Appropriate Federal Common Law,
Petitioner Was Not Unmarried When He Entered
The United States.**

As discussed in Point I-A, *supra*, in certain instances Congress has failed to include definitions in federal statutes. In such circumstances, where these terms can be defined under state law, the courts have utilized the state law definitions to create federal common law interpreting the statute in question where the result would effectuate both state and federal purposes and promote the Congressional intent embodied in the statute. *Rehman v. I.N.S.*, *supra*; *Brea-Garcia v. I.N.S.*, *supra*. However, where such beneficial results cannot be achieved, the courts have refused to create federal common law by reference to the applicable state law and instead have based their conclusions on the policy intended to be promoted by the federal statute. *Nott v. Flemming*, *supra*; *Gloss v. Railroad Retirement Board*, *supra*.

Here also it is apparent that the definition of "unmarried" in the Act cannot be made to hinge on state law for several reasons. First, the nation's power to admit or exclude aliens is exclusively entrusted to Congress. *Kliendienst v. Mandel*, *supra*. It is a "matter wholly political in its character" *Lem Moon Sing v. United States*, 158 U.S. 538, 548 (1895), "a matter of political outlook and national self-interest" *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring), and a matter "depend[ent] on the congressional will" *Shaughnessy v. Mezei*, 345 U.S. 206, 216 (1953), and Congress has been given comparably broad powers "to fix the conditions under which aliens are to be permitted to enter." *Flemming v. Nestor*, 363 U.S. 603, 616 (1960), and to establish and administer procedures by which aliens are admitted and expelled. *United States ex rel. Suey v. Spar*, 149 F.2d 881 (2d Cir.

1945); *Marcello v. Kennedy*, 194 F. Supp. 748 (D.C. D.C. 1961). In this context it is totally inconsistent with Congress' plenary power in this area to permit any state to control federal immigration policy by means of its domestic relations law unless Congress has demonstrated its intent to permit this result.

Second, since the potential scope of the immigration laws is so broad, a strong national interest exists to see them interpreted and applied uniformly. Quite simply this interest cannot be promoted if significant phrases in the Act are subject to the interpretations of the fifty states. Third, it is apparent that the adoption of Petitioner's contentions also cannot promote the national interest in effective enforcement of Congress' decision to admit only unmarried children of special immigrants since it would virtually eliminate that restriction from the Act by permitting any alien to vitiate a violation of this section by obtaining an uncontested annulment in a state, such as New York, where the laws do not even require the other party to appear. Whatever New York State's policy may be toward annulments (See Point II, *infra*), it evolved to resolve problems and promote interests totally unrelated to those inherent in the federal immigration law. Consequently, it clearly should not provide the basis for the federal common law construing that statute. As this Court noted in *Nott v. Flemming*, an action presenting the question of whether a widow who had lost her right to survivor's benefits under the Social Security Act by virtue of her marriage to another could regain this right by having the marriage annulled by a New York State court:

"It is clear that the factors which may lead to holding that an annulment decree does not relate back to revive a former husband's alimony obligation might be totally irrelevant in the event that a state court should be confronted with the issue of whether an annulment decree should relate back

to revive a right to Social Security benefits. . . . It is also clear that this issue of whether social security benefit should be revived will be faced only by federal courts, never by state courts. It seems most unlikely that Congress intended that eligibility for social security benefits should depend upon a body of state law that can never come into existence". *Nott v. Flemming*, *supra* at 381-82. (citations and footnotes omitted)

Finally, those courts asked to incorporate the purported retroactive effects of state annulment decrees into the federal common law construing non-immigration statutes have consistently refused to do so because the results would conflict with federal interests. For example, in *Nott v. Folsom*, *aff'd sub nom. Nott v. Flemming*, as discussed above, the District Court, per Judge Weinfeld, noted the absence of a statutory definition of remarriage in the Social Security Act and concluded that the effect of the plaintiff's New York annulment had to be governed by state law, *Nott v. Folsom*, *supra* at 907. After examining New York law, the Court denied the plaintiff's claim stating:

"Thus, the conclusion is compelled that under New York law a voidable marriage annulled on the ground of fraud is not void ab initio Clearly the remarriage is binding and effective not only until annulled but it continues to have sufficient validity on which to bottom a decree of support of the wife." *Nott v. Folsom*, *supra* at 909.

On appeal this Court affirmed Judge Weinfeld's conclusion but noted that it was "not fully in accord with the emphasis which the district judge placed upon New York law in determining whether Mrs. Nott had 'remarried'." *Nott v. Flemming*, *supra* at 381. Consequently the Court proceeded to analyze the question in relation to the federal interests embodied in the Social Security Act and to deny her application *on that basis*.

A similar conclusion was reached by the District of Columbia Circuit in *Gloss v. Railroad Retirement Board, supra*. In *Gloss*, the Court was presented with the question of whether a New York annulment obtained by a widow after her second marriage revived her right to an annuity under Section 5(b) of the Railroad Retirement Act. *Gloss v. Railroad Retirement Board, supra* at 568. The Court in *Gloss* reached the same conclusion as this Circuit did in *Nott* on the basis of a similar analysis. As the Court stated:

"The statutory term here relates to family law, and ordinarily federal courts look, as the Board did here, to the law of the state for guidance in this area. But state law may not control the Board in its effort to implement the statutory purpose. This is particularly true, not only where the pertinent state law is ill-defined, but where there exists as well over-all disharmony in the law of the several states. Moreover, no state court will ever be called upon to determine whether under this act, annulment for a remarriage revives a widow's rights. This responsibility is with the Board and, in interpreting the Act on a national basis, it should not be required to divine the nuances of the family law of the fifty states." *Gloss v. Railroad Retirement Board, supra* at 569-70. (footnotes omitted); See also *Sadowitz v. Celebrezze*, 226 F. Supp. 430 (S.D.N.Y. 1964).

The Board of Immigration Appeals' decision in this case, to deny retroactive effect to Petitioner's belated and uncontested New York annulment, is consistent with the judicial decisions involving similar questions and the national policy inherent in Congress' decision to limit immigration to the unmarried children of Special Immigrants and in effective and uniform enforcement of the Immigration laws. Moreover, it represents the interpretation of a statute by the agency charged with that

statute's enforcement and, as a result, is entitled to great deference from this Court. *Udall v. Tallman*, 380 U.S. 1, 16 (1964). The position espoused by Petitioner does not foster any of these considerations and probably lacks support under New York law as we shall demonstrate in Point II. Consequently, the Board's decision should be affirmed and this petition dismissed.

POINT II

IF STATE LAW WERE APPLIED TO THIS CASE, PETITIONER WOULD BE DEPORTABLE BECAUSE, UNDER NEW YORK LAW, A DECREE OF ANNULMENT DOES NOT VOID A MARRIAGE AB INITIO.

In Point I, *supra*, we demonstrated that in a deportation proceeding the construction of a term in the Immigration Act is a matter of federal law and that, under either the explicit language of the Act in Section 101(a) (39) or the federal common law reflecting the interests embodied in the Act, the Board's conclusion that Petitioner was not "unmarried" at entry and thus deportable under Section 241(a)(1) was correct. In this section of the brief we shall show that Petitioner would still be deportable if state law were applied to his case because, under current New York statutory law, an annulment decree no longer voids a marriage *ab initio* and therefore Petitioner could not have been "unmarried" when he entered the United States.

Essential to a correct interpretation of New York's current statutory scheme regarding annulments and *Matter of Moncrief*, 235 N.Y. 340 (1923), the sole decision relied upon by Petitioner, is an understanding of the common law origin of the doctrine of annulment and the contributions it has made to New York's Domestic Relations Law. Prior to the enactment of New York's Revised Statutes in 1830, 1 R.S. 142, 2 R.S. 139; See

Price v. Price, 124 N.Y. 589, 597 (1891), the power to annul a marriage existed solely as a result of the common law and was exercised by New York's chancery courts pursuant to their equity jurisdiction. *Price v. Price*, *supra* at 596-98 (1891). Since the common law provided that an annulled marriage was void *ab initio*, the New York courts applied this rule to treat annulled marriages as if they had never existed, *Price v. Price*, *supra* at 596, and to conclude that neither dower nor courtesy rights could be founded upon an annulled marriage, that no property or support rights could be created by such a marriage and that children born during the marriage were made illegitimate by its annulment. *Price v. Price*, *supra* at 597-98.

In 1830 the Revised Statutes were enacted to alter some of the harsher consequences of the common law rule. *Price v. Price*, *supra* at 597. As a result of these statutes, certain marriages, such as fraudulent marriages, were decreed to be merely voidable ("void from the time their nullity shall be declared by a court of competent jurisdiction") and, in certain instances, children born of such voidable marriages were considered legitimate and able to inherit from the estates of both parents. *Price v. Price*, *supra* at 597-98.

Notwithstanding the clear ameliorative intent of these statutory changes, the New York courts continued to apply common law principles to annulled marriages except where the result had been specifically precluded by the statute. For example, in *Price v. Price*, the New York Court of Appeals was presented with the question of whether a voidable marriage which had been annulled could support a wife's claim to a dower interest in property owned by the husband at the date of the annulment decree. Although the Court conceded that, under the statute, the issue of such a marriage would be legitimate, cohabitation by the parties would

not be adulterous and, when judicially terminated, the marriage would be void only from the date of the judgment, *Price v. Price*, *supra* at 599, it nevertheless found that, with respect to the parties themselves, the annulment of their marriage left them "in the same situation in respect to each other, as though a marriage had never been entered into . . ." and concluded that "the plaintiff is not entitled at common law, nor under the statutes of this state, to dower in any of the lands described in her complaint." *Price v. Price*, *supra* at 598, 601.

The restrictive analysis of the Revised Statutes made by the Court in *Price* served to perpetuate the common law rule in the limited instances where the case involved the rights of parties to, or children of, an annulled marriage and the specific situation was not covered by statute. *Jones v. Brinsmade*, 183 N.Y. 258 (1905) (wife of an annulled marriage not entitled to alimony in the absence of a specific statutory provision); *Sleicher v. Sleicher*, 250 N.Y. 366 (1929) (doctrine of void *ab initio* applied to reactivate duties under a previous separation agreement because there was no statutory basis for alimony from the husband of the annulled marriage); *See generally*, *Nott v. Folsom*, *supra* at 908. However the common law rule was never applied by New York courts in situations where the rights of third parties depended on the validity of an annulled marriage. *American Surety Company v. Conner*, 251 N.Y. 1 (1929) (creditor of husband to an annulled marriage cannot recover gifts made to the wife since the marriage served as valid consideration for the transfer—"The decree of annulment destroyed the marriage from the beginning as a source of rights and duties . . . , but it could not obliterate the past and make events unreal"); *Williams v. State*, 175 Misc. 972, 25 N.Y.S. 2d 968 (Ct. Cl. 1941) (During the life of an annulled marriage husband has duty to support wife and, consequently, cannot recover from the state monies he was forced to pay for

her support while she was incompetent and kept in a state institution—"The doctrine of relation back involved in [an annulment] decree is not one demanding constant or universal application. However just its application may be between the parties to an annulled marriage, for the purpose of protecting the injured spouse, it does not follow that the doctrine is inevitably to be applied so as to impair the vested rights of third parties who did not participate in the fraud that resulted in the dissolution of the marital ties.").

Examined in this light, the New York Court of Appeals decision in *Matter of Moncrief*, the case relied on by Petitioner, is consistent with these prior decisions and the law in effect at that time. In *Matter of Moncrief* a child sued to recover a distributive share of her mother's estate on the basis of Chapter 531 of the laws of 1895 which provided: "all legitimate children whose parents have been heretofore intermarried . . . shall be considered legitimate for all purposes." The child's parents had married the day after she was born and their marriage had been annulled subsequently for duress. The question presented to the Court therefore was similar to the one in *Price v. Price*, namely, whether the statute in effect at that time had altered the common law rule regarding annulments. If such a change had occurred, then the marriage was valid prior to its termination and the child was legitimate and entitled to share in her mother's estate.

Using the analysis it employed in *Price v. Price*, the New York Court of Appeals compared the common law with the language in Chapter 531 and concluded:

"We said that at common law where a marriage was annulled the parties were in the same position as though a marriage had never been entered into and children born of it were all illegitimate unless legitimated by statute. This rule remains unimpaired." *Matter of Moncrief*, *supra* at 396.

Accordingly, in the absence of a statute to the contrary, the Court applied the common law rule and found that, since the parents' marriage was void *ab initio*, they could not have intermarried under Chapter 531 and therefore could not have legitimated their child under that statute so as to permit her to recover.

Seizing upon the Court's application of the common law rule to the law and facts present in *Matter of Moncrief*, Petitioner has attempted to extend the holding in that decision to support his contention that the common law rule retains vitality in New York today. However, clearly Petitioner's reliance on *Matter of Moncrief* in this regard is misplaced in two significant respects.

First, in marked contrast to the New York law in effect when *Matter of Moncrief* was decided, today an action for annulment, like Petitioner's, is an entirely statutory procedure, see New York Domestic Relations Law, Sections 7, 140-146; *Romano v. Romano*, 19 N.Y. 2d 444, 448, 280 N.Y.S. 2d 570, 574 (1970), and all marital and other rights involved in such actions are resolved pursuant to the statutory scheme. See, New York Domestic Relations Law, Section 145 (legitimation of children); Section 234 (property rights); and Section 236 (alimony and support). Consequently, the decision in *Matter of Moncrief* no longer has any vitality under New York because there are no situations in an annulment action to which the common law rule could apply. *Gaines v. Jacobson*, 308 N.Y. 218, 225, 124 N.E. 2d 290, 294 (1954). As the New York Court of Appeals recognized in *Gaines*, a decision in which the Court overruled its earlier conclusion in *Sleicher v. Sleicher*, *supra*, that, under the common law, a prior husband's obligation to support his wife pursuant to a separation agreement revives when her second marriage is annulled;

"In 1929, when *Sleicher*, was decided there was no [Domestic Relations Law Section 236], with

the consequence that, if the remarriage ended in annulment rather than divorce, no alimony could have been awarded against the second spouse. . . .

Today, through the operation of [Domestic Relations Law, Section 236], the wife can receive support from the husband of the annulled marriage where 'justice requires,' and there is no more reason to revive the obligation of the first husband—a stranger to the annulment—than there would be if the marriage were terminated by divorce. The 'purposes of justice' now dictate that his discharge, effected when the wife goes through a second marriage, be permanent. . . .

Not only does the practical justification for the *Sleicher* decision fall with the statement of [Domestic Relations Law, Section 236], *but its doctrinal basis becomes extremely questionable as well.* The fiction that annulment effaces a marriage 'as if it had never been' is sometimes given effect and sometimes ignored, as the 'purposes of justice' are deemed to require. . . .

By writing [Domestic Relations Law, Section 236] into the law, the legislature has chosen, without regard to whether the marriage is void or voidable, to attach to annulled marriages sufficient validity and significance to support an award of alimony, in other words, to serve, the same as any valid marriage would, as the foundation of a continuing duty to support the wife after the remarriage is terminated. (See *Johnson v. Johnson*, 295 N.Y. 477.) It has declared, in effect, that, for the purpose of sustaining a right to support after annulment, the annulled marriage is no longer to be deemed a nullity, 'effaced as if it had never been! *In so doing, the legislature has destroyed the very foundation of the Sleicher deci-*

cision." (Emphasis added). See also *Nott v. Folsom*, *supra* at 909.

Since, under New York law, Petitioner's marriage retains "sufficient validity" to support an award of alimony, to vest property rights in the parties and to legitimize the rights of children born during its existence, it clearly precludes the application of the common law rule enunciated in *Matter of Moncrief* to vitiate Petitioner's immigration violation.

In addition, even if the common law rule still retained some vitality in New York, it is apparent that the holding in *Matter of Moncrief* would not support Petitioner's contentions in this appeal. In *Matter of Moncrief* the Court was asked to resolve the rights of parties to a marriage that had been annulled. The Court was not asked to determine to rights of innocent third parties who had acted in reliance on the marriage. In these latter situations, such as presented in this appeal, New York's courts have refused consistently to apply annulments retroactively where the result would cause injustice, *American Surety Co. v. Conner*, *supra*, or would be contrary to the interest of the state, *Williams v. State*, *supra*. Consequently, even under the law in effect when *Matter of Moncrief* was decided, Petitioner's marriage would not have been considered void *ab initio* and his contentions in this regard are unsupportable.

As both the evolution of New York's annulment laws and its current statutory annulment procedure demonstrate, the common law rule represented by *Matter of Moncrief* is no longer applicable to New York annulment actions. Today New York not only considers annulled marriages to be binding and effective until their termination but also gives them sufficient continued validity to support a decree of alimony for the wife. Under these circumstances it is clear that even under New York law Petitioner's belated and uncontested annulment would not

vitate his immigration law violation and that, as a result, the Board's finding of deportability was correct and this petition for review must be dismissed.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
September 9, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Respondent.*

ROBERT S. GROBAN, JR.,
Special Assistant United States Attorney,
SAMUEL J. WILSON,
*Assistant United States Attorney,
Of Counsel.*

AFFIDAVIT OF MAILING

CA 77-4060

State of New York) ss
County of New York)

MARIAN J. BRYANT

being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

2 copies

13th day of September 19 77 she served a copy of the
within respondents brief

by placing the same in a properly postpaid franked envelope
addressed:

Dr. Antonio C. Martinez, J.D.
324 West 14th St.
New York, NY 10014

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

13th day of September, 19 77

Pauline J. Proca

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978

